IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1947

No. 40

DONALD WADE,
PETITIONER,

vs.

NATHAN MAYO, as State Prison Custodian of the State of Florida,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT.

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OPINIONS OF THE COURTS BELOW

The judgment of the District Court is found in the record (Tr. 53-54). The District Court's Supplemental Memorandum, which was by its terms made a part of said judgment, is also exhibited by the record (Tr. 61-62).

The opinion of the Circuit Court of Appeals for the Fifth Circuit, which is here for review on writ of certiorari, is reported in 158 Federal Reporter, 2d Series, at page 614.

JURISDICTION

The jurisdiction of this Court is based upon U.S.C.A. 28, Section 347(a).

STATEMENT OF THE CASE

The petitioner is a young man who was eighteen years old at the time of his trial in the State Court, and who has an eighth grade education. In November, 1943, he was tried in Jackson County, Florida, upon a charge of burglary (breaking and entering); he pled guilty thereto and was sentenced to serve a term of two years in the Florida State Prison from and after the 10th day of November, 1943. Having served a portion of this time, he was released under parole.

While under such parole, he was charged in the Criminal Court of Record of Palm Beach County with the crime of burglary. The information in said case was filed against the petitioner on the 19th day of February, 1945; he was arraigned on February 20, 1945, and pled not guilty. He was again before the Court on March 6, 1945, when his case was set for trial on March 14, 1945. The father and mother of the petitioner tried to obtain counsel for him, but were unable to do so. On the day of his trial, to-wit: March 14, 1945, the petitioner asked the trial court to appoint counsel to defend him but this request was denied by the trial court. On said date, he was tried before a jury and was convicted of said crime of burglary, for which he was sentenced to serve a term of five years in the State Prison.

After the said conviction and sentence in the Criminal Court of Record of Palm Beach County, the appellant filed in the Circuit Court of said County, his petition for a writ of habeas corpus, in which he alleged that because of said trial court's refusal to appoint counsel for him he was denied due process of law guaranteed him by the Constitution and laws of the United States and the Constitution and laws of the State of Florida. The writ of habeas corpus which was issued pursuant to said petition was thereafter quashed by order of said Circuit

Court. Thereupon, the petitioner appealed from said order to the Supreme Court of the State of Florida, and, upon motion of the Attorney General, the said appeal was dismissed by said Supreme Court.

Thereafter, on May 10, 1946, the petitioner filed in the District Court for the Southern District of Florida, Jacksonville Division, his petition for a writ of habeas corpus in which he alleged that when his said burglary case was called for trial in the Criminal Court of Record in Palm Beach County, he stated to the presiding Judge that he was without money with which to employ counsel and asked the Court to appoint counsel for his defense, and that said request was denied; that he is eighteen years of age (his testimony showed that he was eighteen years old at the time of his trial on said burglary charge); that he is possessed of only an eighth grade education; that he is unfamiliar with the procedure and practice in the courts, and that he was forced to trial without the aid of counsel in violation of his constitutional right guaranteed him under the Constitution of the United States; that he does not think that an appeal to the Supreme Court of Florida would be of any use to him for the reason that the Supreme Court of Florida has decided in two cases that it has no power, except in capital cases, to reverse convictions because the defendants were not represented by counsel (Tr. 1-8).

Said United States District Court issued a writ of habeas corpus on said petition (Tr. 9-10).

The respondent duly filed his return to said writ, in which return he denied that the petitioner's rights were violated by the trial court's refusal to appoint counsel for his defense, and denied that the petitioner was tried, convicted and sentenced without due process of law. Among other things, said return alleged that the petitioner was literate and intelligent; that the information

was filed against the petitioner on February 19, 1945; that he was arraigned several weeks before the trial, and at a later date was before the Court when the case was assigned for trial upon a day certain, but that upon neither occasion did petitioner make any request for the appointment of counsel or any representation to the Court that he was without funds or resources with which to employ counsel; that when the case was called for trial on March 14, 1945, petitioner, for the first time, requested the Court to appoint such counsel, which request was properly denied; that during the progress of impaneling a jury, he was advised of his right to challenge jurors and to excuse as many as six jurors without assigning any reason therefor, and, after being so advised, accepted a jury tendered by the State; that the State produced evidence quite sufficient to sustain the verdict of guilty rendered by the jury; that the petitioner was afforded opportunity and advised of his right to cross examine the State's witnesses, but declined to avail himself of such right; that he took the stand and testified fully in his own behalf; that no argument to the jury was made by either side; that the trial judge charged the jury fairly and in accordance with the law, and the jury brought in the verdict of guilty which is the basis of the petitioner's conviction, sentence and commitment; that the petitioner was not a stranger to criminal procedure and that he fully presented his defense and was given a fair and impartial trial (Tr. 10-16).

Testimony was duly taken in said habeas corpus case. Thereafter, on May 18, 1946, said United States District Court entered its final judgment (Tr. 53-54), and on May 29, 1946, filed in connection with and as a part of said judgment its supplemental memorandum (Tr. 61-62), which judgment and memorandum held that the petitioner "though not wholly a stranger to the court room, having been convicted of prior offenses, was still an in-

experienced youth unfamiliar with court procedure and not capable of adequately representing himself;" that Section 11 of the Declaration of Rights of the Florida Constitution, as construed by the Supreme Court of Florida, created a mandatory organic rule of procedure, essential to a fair trial in all criminal prosecutions and in all courts of the State of Florida that an indigent accused has a right to the appointment of counsel upon request; that a failure upon the part of the court to so appoint counsel is a denial to the party accused of a fair trial contrary to Section 11 of the Declaration of Rights of the Florida Constitution, and constitutes a denial of due process contrary to the fourteenth amendment to the Federal Constitution; and that, because of the denial of the petitioner's request for counsel, the judgment and sentence entered against him by the Palm Beach Criminal Court of Record was null and void. Said judgment discharged the petitioner from the custody of the respondent and remanded him to the custody of the sheriff of Palm Beach County, Florida, for further proceedings under the information.

The respondent appealed to the Circuit Court of Appeals for the Fifth Circuit, which court reversed the judgment of the District Court.

The matter is now pending in this Court upon writ of certiorari granted by this Court to review the Circuit Court of Appeals' judgment of reversal.

QUESTIONS INVOLVED

The questions presented are as follows:

1. DID THE TRIAL COURT'S REFUSAL TO APPOINT COUNSEL FOR THE PETITIONER DENY THE PETITIONER ANY RIGHT GUARANTEED BY THE LAWS OF FLORIDA, AND PARTICULARLY BY SEC-

TION 11 OF THE DECLARATION OF RIGHTS OF THE CONSTITUTION OF FLORIDA?

2. UNDER THE CIRCUMSTANCES INVOLVED, DID THE TRIAL COURT'S REFUSAL TO APPOINT COUNSEL FOR THE PETITIONER DEPRIVE HIM OF DUE PROCESS OF LAW CONTRARY TO THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION?

ARGUMENT

FIRST QUESTION

THE TRIAL COURT'S REFUSAL TO APPOINT COUNSEL FOR THE PETITIONER DID NOT DENY THE PETITIONER ANY RIGHT GUARANTEED BY THE LAWS OF FLORIDA.

The statutes of Florida do not require the Court to appoint counsel for indigent persons except in capital cases. (See governing Section 909.21, Florida Statutes, 1941, set out in the appendix hereto attached).

The petitioner relies on Section 11 of the Declaration of Rights of the Florida Constitution, which reads as follows:

> "Sec. 11. In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury, in the county where the crime was committed, and shall be heard by himself, or counsel, or both, to demand the nature and cause of the accusation against him, to meet the witnesses against him face to face, and have compulsory process for the attendance of witnesses in his favor, and shall be furnished with a copy of the indictment against him."

The only cases found by us which are entitled to be classed as authority on the question of whether Section 11 of the Declaration of Rights of Florida requires the appointment of counsel for indigent defendants in non-capital felony cases are: Cutts v. State, 54 Fla. 21, 45 So. 491; Weatherford v. State, 76 Fla. 219, 79 So. 680; Myers v. State, 84 Fla. 508, 94 So. 507; Watson v. State, 142 Fla. 218, 194 So. 640; Johnson v. State, 148 Fla. 510, 4 So. 2d. 671; Donald Wade v. State, 155 Fla. 906, 23 So. 2d. 163; and John R. Johnson v. State, 26 So. 2d. 585 (not yet reported in Florida Reports).

We have found a number of other Florida cases (which we will hereinafter discuss) in which mention is made of the right to counsel, but none of them involved a decision of the question here under consideration, viz., as to whether Florida law requires the appointment of counsel for indigent defendants in non-capital felony cases; and therefore any language used in said cases which might be thought to supply the answer to said question was obiter dicta which conflicted with the holdings in the above named cases wherein the question was actually involved.

In Cutts v. State, supra, (cited in the petitioner's brief) one of the grounds urged for reversal was that no attorney had been appointed for the accused, who had been convicted of first degree murder and given the death penalty. In that case, the Supreme Court of Florida said:

> *"It has been the general practice in trial courts in this state,* when a party charged with felony has been brought to the bar for arraignment, to inquire of the accused whether he had counsel to represent him, and if, upon inquiry, it developed that he had no attorney and was unable to employ one, to ask the accused whether he desired one to represent him. If he signified his desire to be

represented by counsel, then it has been the practice for the trial judge to appoint some attorney to represent the accused. *This practice is in accord with the letter and spirit of section 11 of the Bill of Rights* and section 3969 of the General Statutes of 1906." (Emphasis supplied)

* * * *

"While the practice in this state has been as indicated above, still there is no law requiring it, and it is not usual for the record to show that this practice is observed." (Emphasis supplied)

If, in the Cutts case the Supreme Court of Florida had contented itself with observing that the practice of appointing counsel accorded with the letter and spirit of Section 11 of the Bill of Rights, then the Cutts case would be substantial authority for the position that said constitutional and statutory provisions required the appointment of counsel in a felony case. However, by thereafter stating "While the practice in this state has been as indicated above, still there is no law requiring it," the Supreme Court of Florida definitely held that Section 11 of the Florida Bill of Rights does not require the appointment of counsel.

In Weatherford v. State, supra, (cited in the petitioner's brief) the Supreme Court of Florida cited with approval the above quotations from the Cutts case.

Also, in Myers v. State, supra, the Supreme Court of Florida quoted from Cutts v. State, supra, as follows:

" 'Every person accused of crime has a right to have counsel to aid him in his defense, but no one is compelled to employ counsel. If the record fails to show whether the accused had counsel or not, or even if it shows that he did not have counsel, it is not ground for reversal, unless it further appears that the right to have counsel was denied. It is not to be presumed that the right was denied.' "

However, said quotation from Myers v. State deals only with the denial of the right to have counsel—not with the question of whether the Court must appoint counsel. And we again call attention to the Supreme Court's statement in the same Cutts case from which the above quotation was cited, that "there is no law requiring it" (the appointment of counsel).

Our construction of the Cutts case is that adopted by this Court in Betts v. Brady, 316 U. S. 455, 86 L. Ed. 1595 (text 1605), wherein this Court, in discussing the requirements of the Constitutions of the several states as to the appointment of counsel, said:

> "The constitutions of all the states, presently in force, save that of Virginia, contain provisions with respect to the assistance of counsel in criminal trials. Those of nine states may be said to embody a guarantee textually the same as that of the Sixth Amendment or of like import. In the fundamental law of most states, however, the language used indicates only that a defendant is not to be denied the privilege of representation by counsel of his choice."
>
> "In three states the guarantee, whether or not in the exact phraseology of the Sixth Amendment, has been held to require appointment in all cases where the defendant is unable to procure counsel. *In six the provisions (one of which is like the Sixth Amendment) have been held not to require the appointment of counsel for indigent defendants.*" (Emphasis supplied)

and in the footnote to the last sentence of said quoted matter, being Footnote 24, this Court correctly construed Cutts v. State, supra, as authority for including Florida among the six states wherein the state constitutional provisions have been held not to require the appointment of counsel for indigent defendants.

In Watson v. State, supra, it was contended on appeal that the accused in a felony case (not capital) had been denied the right to a fair and impartial trial as guaranteed by the Constitution because the said accused were not assisted by counsel during the trial. In disposing of this contention adversely to the appellants, the Supreme Court of Florida said:

> "The Legislature of Florida, by the enactment of Section 8375, C.G.L., restricts the power of the courts to appoint counsel for indigent defendants at public expense to capital cases. *The case at bar is not a capital case and therefore no duty rested on the lower court to supply counsel for plaintiffs in error at public expense.*" (Emphasis supplied)

It is true that in said Watson case the Supreme Court of Florida made no specific mention of Section 11 of the Declaration of Rights, but it is equally true that said Section 11 was in existence at the time of said decision and had just as much binding force and effect then as it has now, no more and no less. And, it is also true that the Supreme Court of Florida, with full knowledge of the existence and import of Section 11, and in the face of Watson's contention that he had been denied a fair and impartial trial as guaranteed by the constitution because he had not been assisted by counsel unequivocally said that no duty rested on the lower court to supply counsel for the accused at public expense because the case was not a capital case. Further, in the Watson case the Supreme Court of Florida gave full scope and effect to Section 8375, C.G.L. (whose provision for the appointment of counsel in capital cases only is brought forward in Section 909.21, Florida Statutes, 1941, said Section 909.21, being set out in the appendix attached hereto), despite the existence of Section 11 of the Florida Bill of Rights, and this was in effect a holding that said statute

furnished the applicable rule and that Section 11 of the Declaration of Rights imposed no additional duty to appoint counsel.

In Johnson v. State, supra, the Supreme Court of Florida had under consideration a non-capital felony conviction for manslaughter wherein one of the grounds of complaint was that because of things beyond the control of the accused he had to go to trial without counsel, although he had theretofore relied upon having counsel to represent him. In disposing of this contention adversely to the contentions of the accused the Supreme Court of Florida said:

> *"There was no duty resting upon the trial court to appoint counsel to represent the accused as he was not charged with a capital offense.* See Sec. 157, Criminal Procedure, Acts 1939, c. 19554; Watson et al. v. State, 142 Florida 218, 194 So. 640." (Emphasis supplied)

thereby in effect holding that Section 157 of the Criminal Procedure Act of 1939 (now Section 909.21, Florida Statutes, 1941; see appendix hereto for text), which does not require the appointment of counsel except in capital cases, provides the controlling rule in Florida. Here, again, the Supreme Court of Florida did not in so many words mention Section 11 of the Bill of Rights, but said Section 11 was in existence, and, by holding that the statute prescribed the applicable rule, the Florida Court in effect held that said Section 11 provided no rights to an accused which were not provided by the statute.

The case of Donald Wade v. State, supra, involved an appeal to the Supreme Court of Florida which was taken by the petitioner in the case at bar from the judgment of the Circuit Court of Palm Beach County, Florida, remanding the petitioner herein to the custody of the Sheriff of said county in a habeas corpus case brought

by the petitioner. The only thing shown in the official report of said case in 23 So. 2d. 163 is that the appeal was dismissed on motion of the Attorney General, and therefore it is necessary to go into the background which furnished the basis for such dismissal. The records of the Supreme Court of Florida reveal that the petitioner, Donald Wade, after his conviction for the very offense involved in the habeas corpus proceeding in the case at bar, filed a petition for writ of habeas corpus in which he made substantially the same allegations as he made in the case at bar as to his request for appointment of counsel having been denied by the trial court, and as to his need of and financial inability to procure counsel; that in said State Circuit Court he alleged in his petition that by reason of the refusal of the trial court to appoint counsel for him, he was deprived of the due process of law guaranteed under the Constitution and laws of the State of Florida, and of the United States of America; that writ of habeas corpus was issued on said petition; that upon the authority of Watson v. State, supra, and Johnson v. State, supra, the said Circuit Court made its order quashing the said writ of habeas corpus and remanding the petitioner to the custody of the respondent sheriff; that the petitioner appealed from said order to the Supreme Court of Florida; that the Attorney General moved to dismiss the appeal upon the ground that it was frivolous and without merit; that in response to said motion to dismiss the appeal the petitioner, by counsel, filed his brief on the merits, in which brief he renewed his contention that he had been denied due process of law under the State and Federal Constitutions; and that after the filing of said brief the said Supreme Court considered and acted upon said motion to dismiss and made the order granting same which is set out in 23 So. 2d. 163. Consequently, the order made by the Supreme Court of Florida dismissing the petitioner's above mentioned ap-

peal as being frivolous and without merit necessarily had the effect of holding that the petitioner had not been denied due process of law under Section 11 of the Bill of Rights of the Florida Constitution or under any other provision of the Florida Constitution.

In John R. Johnson vs. State, supra, Johnson filed in the Supreme Court of Florida a petition for writ of habeas corpus in which he alleged that he had been put on trial for the larceny of an automobile, a non-capital felony, without the aid of counsel; that he had advised the court that he was without funds to employ counsel and had requested the court to appoint counsel for him; and that the Court's refusal to appoint counsel for him was a violation of Section 11 of the Declaration of Rights of the Constitution of Florida and of the Fourteenth Amendment to the Constitution of the United States. In denying the writ of habeas corpus applied for by Johnson, the Supreme Court of Florida said:

> "So it is that the sole question presented for our consideration and determination is, whether or not under the Constitution and statutes of the State of Florida the judge of a trial court is required to appoint counsel to defend an indigent defendant when put upon trial under an indictment or in charging such defendant with the commission of a felony. Section 11 of the Declaration of Rights is as follows:
>
> " 'Sec. 11. In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury, in the county where the crime was committed, and shall be heard by himself, or counsel, or both, to demand the nature and cause of the accusation against him, to meet the witnesses against him face to face, and have compulsory process for the attendance of witnesses in his favor, and shall be furnished with a copy of the indictment against him.'

"The only statute which we have in this State touching upon the question here under consideration is Section 909.21, Fla. Statutes, 1941, same F.S.A., which provides for the appointment by the trial judge of counsel for an insolvent defendant who is charged with a capital offense. This section of the statute limits requirement, that counsel be appointed by the court for indigent defendants to those defendants who are charged with the commission of a capital offense. *Our construction of Sec. 11 of our Declaration of Rights is that any defendant charged with a felony in the courts of this state shall have the right to be heard in his own defense in his own proper person and also by counsel, if he has counsel, and presents himself and his counsel at the bar of the court where he is to be heard. But this constitutional provision does not require that he should provide himself with counsel, nor does it require that the State should furnish him counsel to be selected and appointed by the trial court.* (Emphasis supplied)

"We have repeatedly held that in cases where the charge was less than a capital offense no duty rested upon the trial court to supply counsel for the defendant. See Cutts v. State, 54 Fla. 21, 45 So. 491; Watson et al. v. State, 142 Fla. 218, 194 So. 640; Johnson v. State, 148 Fla. 510, 4 So. 2d. 671.

"In May, 1945, Donald Wade presented his appeal to this Court from a judgment quashing a writ of habeas corpus theretofore issued by the Circuit Court of Palm Beach County on the petition of Donald Wade alleging that he had been unlawfully convicted of the commission of a felony in Palm Beach County in that 'at the time of his trial, conviction and sentence he was without aid of counsel and the court did not make an appointment of counsel, nor did petitioner waive his constitutional rights to the aid of counsel, and he was incapable adequately of making his own defense, in consequence of which he was com-

pelled to go to trial without the aid of counsel.' It was also alleged that he was ignorant and was also, because of lack of funds, unable to employ counsel; and that he requested the court to appoint counsel for him. He further alleged that he was not guilty of the offense charged.

"Motion was made to dismiss the petition on the ground that the appeal was frivolous and on May 14, 1945, we entered an order granting the motion to dismiss on the ground stated.

"We recognize the fact that in a great number of cases in other jurisdictions courts have construed provisions of respective State Constitutions similar to ours to guarantee to a defendant charged with a felony the benefit of counsel.

"We are also cognizant of the rule in the Federal Courts but we are of the view that those decisions do not control in Florida.

"We shall not refer to what has been said by this Court concerning the right of an indigent defendant charged with a capital offense to have counsel appointed by the court to conduct his defense because that right does not flow from Section 11 of our Declaration of Rights, but does flow from a statute, Section 909.21, supra."

The holdings in said late cases of Watson v. State, supra, Johnson v. State, supra, Donald Wade v. State, supra, and John R. Johnson v. State, supra, are strictly in line with the Florida Supreme Court's earlier pronouncement to the same effect in Cutts v. State, supra.

The petitioner cites Walker v. State, 150 Fla. 476, 8 So. 2d. 22, but that case had nothing to do with the right of an indigent accused to have the court appoint counsel for him. Walker's contention was that his confession was obtained from him illegally because he "had been drinking, was taken into custody and placed in jail and *deprived of the privilege of securing an attor-*

ney." It was with respect to this contention (which had nothing to do with the right to have the court appoint counsel) that the Florida Supreme Court said that:

> "Officers in their zeal to enforce the criminal laws are bound to recognize that men charged with crime have fundamental rights that must be safeguarded, and among these is representation by counsel. These fundamental rights must be respected and observed when enforcing the criminal laws."

The petitioner cites Deeb v. State, 131 Fla. 362, 179 So. 894, but that case is not in point because it did not concern the question of whether an indigent accused has the right to have the court appoint counsel for him. It is true that the Florida Supreme Court made the following statement which, if considered without reference to the point before said Court for decision, is susceptible to the interpretation placed upon it by the petitioner, to-wit:

> "The absolute command of the Constitution that, 'in all criminal prosecutions, the accused . . . shall be heard by himself, or counsel, or both,' is more than a right secured to an accused. It is a mandatory organic rule of procedure in all criminal prosecutions in all courts of this State."

However, if the above isolated quotation from the Deeb case is considered in the light of the point dealt with, it is clear that said quotation is not authority for the petitioner's position that an accused in a non-capital felony case is entitled to have counsel appointed for him. The Florida Court gave the following reason for its said reference to Section 11 of the Bill of Rights of the Florida Constitution, to-wit:

> "The above reference to the organic rights of the accused to be heard by counsel, and to the duties of counsel in criminal prosecutions, is made

> preliminary to a consideration of an assignment of error on a charge of the court to the jury, after the state attorney and counsel for the accused had concluded their opening statements to the jury."

The charge to the jury which the Florida Supreme Court was passing upon dealt with the consideration to be given by the jury to the arguments of counsel, and, among other things, it told the jury that:

> "So the jury must be extremely cautious in considering the statements of counsel and not view it in the light of testimony in the case."

It is also true that in the Deeb case the Florida Supreme Court said that:

> "A command of the Constitution is that: 'In all criminal prosecutions, the accused . . . shall be heard by himself, or counsel, or both.' This organic provision necessarily gives to an accused on trial a wider latitude in testifying for himself than is accorded to mere witnesses under judicial or statutory rules of evidence. Such organic provision cannot legally be evaded; and the full benefit of the organic command should not be denied by a too strict application of judicial or statutory rules of evidence or of procedure. 12 C. J. 1205. When an accused testifies at his own trial for an alleged crime, he should be allowed to adduce pertinent facts that have direct and material relation to the merits of the defense he interposes. Otherwise the organic command which is the controlling law will not serve its intended purpose in the administration of justice by due course of law. This does not give to the accused an unlimited right to testify to irrelevant matters; but the command that an accused on trial 'shall be heard by himself, or counsel, or both,' certainly affords to an accused a right to be heard in response to appropriate questions by his counsel as to a matter that had been shown by State witnesses to have direct relation to the homicide for which the accused was being tried."

It is apparent that the said last quoted matter did no more than lay down the rule that the provision of Section 11 of the Declaration of Rights of the Constitution of Florida, that an accused shall be heard by himself, or counsel, or both, requires that an accused should be allowed to adduce pertinent facts that have direct and material relation to the merits of the defense he interposes. It is equally apparent that when the Florida Court made this pronouncement, it was not dealing with the question of whether or not Deeb had the right to have counsel appointed for him. As a matter of fact, the Florida Court's opinion in the Deeb case shows that Deeb was represented by counsel at his trial.

The petitioner cites Lowe v. State, 95 Fla. 81, 116 So. 240, but that case did not involve the question of whether an indigent accused in a non-capital case has the right to have the court appoint counsel for him. Lowe was charged with rape, a capital offense, and the trial court did appoint counsel for him, pursuant to the requirement of the statute that counsel be appointed for indigent defendants charged with capital offenses. The question in the Lowe case was as to whether a motion for continuance should have been granted because only four days elapsed from the appointment of counsel until the date of the trial, it being claimed that Lowe's counsel did not have sufficient time and opportunity to prepare for trial.

The petitioner cites Christie v. State, 94 Fla. 469, 114 So. 450. It is true that in that case the Florida Supreme Court said that a fair and impartial trial contemplates counsel to look after the defense of the accused, and that when less than this is given the spirit and purpose of the law is defeated. We point out, however, that such statement did not involve the question of whether an indigent accused in a non-capital felony case had the right to

require the court to appoint counsel for him. Said statement was made on the basis of the fact that, although Christie had employed counsel who were diligent in his behalf, the circumstances of the case showed that he was denied the fair benefit of having such counsel by being placed on trial before his counsel had adequate time to prepare and present his defense; and the reversal was based upon the denial of Christie's motion for continuance. The Florida Court was merely deciding that he had the right to adequate time for his counsel (furnished by him) to prepare his defense, which is a far cry from the question of whether a man is entitled to have counsel appointed for him.

There are other Florida cases not involving the point here under consideration in which general expressions have been made by the Florida Supreme Court in regard to denial of the right to counsel, such as:

May v. State, 89 Fla. 78, 103 So. 115, in which it was held that a trial court's action in restricting counsel to 20 minutes argument was in effect a deprival of the right to be heard by counsel (May furnished his own counsel);

Reed v. State, 94 Fla. 32, 113 So. 630 (a capital case), in which it was said that it was the duty of the trial court to appoint capable counsel for the accused (when Reed was tried in 1926, Section 8375, C.G.L., required the court to appoint counsel in capital cases where the defendant was insolvent);

Cooper v. State, 106 Fla. 254, 143 So. 217, which cited Section 11 of the Declaration of Rights in support of the ruling that a limitation of five minutes upon argument of counsel was a violation of the accused's right to be heard by counsel (Cooper furnished his own counsel);

House v. State, 130 Fla. 400, 177 So. 705, in which House claimed that he was denied an opportunity to get

in touch with counsel already employed by him (no question of the right to have the Court appoint counsel being involved), and in which the Florida Supreme Court cited Powell v. Alabama, 287 U. S. 45, 77 L. Ed. 158, as holding that the right of one charged with crime to be represented by counsel of his own choice includes a fair opportunity to secure counsel of his own choice and that, if the accused is unable to employ counsel, the Court should *in certain cases* (the Powell case involved a capital crime) appoint counsel;

McCall v. State, 136 Fla. 343, 186 So. 667, (a capital case), wherein the Florida Supreme Court held that, in line with cited cases decided by the United States Supreme Court, counsel should be appointed in a capital case for an accused who is unable to employ counsel (as we have observed, Section 8375, C.G.L., and its successor, Section 909.21, Florida Statutes, 1941, both provided for the appointment of counsel for indigent defendants in capital cases);

Williams v. State, 143 Fla. 826, 197 So. 562 (a capital case), cited by petitioner, which went no further than to hold that a trial court has the inherent right (nothing said about duty) to appoint an attorney to represent an indigent defendant charged with a felony; and

Wood v. State, 155 Fla. 256, 19 So. 2d. 872, in which the Florida Supreme Court said, by way of obiter dictum, that a fair trial contemplates counsel. Neither in the Court's opinion nor in the briefs filed in said case is there even the slightest suggestion that the matter of counsel was involved. As a matter of fact, Wood was represented by able counsel throughout the proceedings in the trial court, and his right to use to the fullest extent the counsel which he furnished for himself was not brought into question.

The statements of the Florida Supreme Court in said May, Reed, Cooper, House, McCall, Williams and Wood cases should be construed in the light of the fact that they were made in connection with some point other than the one here under consideration.

We submit that every Florida case in point upholds our contention that an accused in a non-capital felony case has no right under Section 11 of the Florida Declaration of Rights to have the Court appoint counsel for him; that Section 909.21, Florida Statutes, 1941, providing for the appointment of counsel in capital cases, is the only requirement of Florida law as to the appointment of counsel; that Section 11 of the Florida Declaration of Rights imposes no additional duty in that regard.

SECOND QUESTION

UNDER THE CIRCUMSTANCES INVOLVED, THE TRIAL COURT'S REFUSAL TO APPOINT COUNSEL FOR THE PETITIONER DID NOT DEPRIVE HIM OF DUE PROCESS OF LAW CONTRARY TO THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION.

The information under which the petitioner was convicted in the Criminal Court of Record of Palm Beach County, Florida, on March 14, 1945, charged him with burglary, i.e., with breaking and entering the store building of a named person with intent to commit a felony, to-wit: grand larceny, by stealing, taking and carrying away property of another of the value of more than fifty dollars.

Since the information does not appear in the record, a copy thereof is annexed hereto for the information of the Court. (See appendix hereto). It was framed under

Section 810.02, Florida Statutes 1941 (set out in the appendix hereto).

The petitioner was eighteen years old and had an eighth grade education at the time of his conviction (Tr. 24).

In November, 1943, he had pleaded guilty to a burglary charge in Jackson County, Florida, and had served a portion of his sentence, from which he was on parole at the time he committed the burglary for which he was convicted in Palm Beach County on March 14, 1945 (Tr. 13, 30, 42, 51-52).

Although he was arrested on February 19, 1945 (Tr. 24) and was arraigned on February 20, 1945 (Tr. 36) and was present in court on March 6, 1945, when his case was set for trial (Tr. 36) on March 14, 1945 (Tr. 37), he made no request for the trial court to furnish him counsel until he was called for trial (Tr. 41) on March 14, 1945 (Tr. 26).

No complicated questions of law were involved in the case.

It was a charge with which the petitioner was not unfamiliar, as is shown by the above mentioned fact that he had previously pleaded guilty to committing the same kind of crime in Jackson County and had served time therefor in the State Prison.

Only simple questions of fact were involved, that is to say, (1) whether the petitioner broke into and entered the building mentioned in the information; (2) whether the building belonged to the owner alleged in the information; and (3) whether such breaking and entering was with the intent to steal property of the value of more than fifty dollars.

These questions of fact were so uncomplicated that no person could have failed to understand the matters

involved who, as was the case with the petitioner, had reached the age of eighteen years, had sufficient mental acumen to have completed the eighth grade in school, and had had the maturing experience gained by a previous conviction and imprisonment in the State Prison.

The petitioner's trial was most fairly and impartially conducted, and the trial judge kept the petitioner advised as to procedure.

During the trial, he was advised that he had the right to cross-examine the State's witnesses, and he did cross-examine them (Tr. 39-40). He took the stand as a witness in his own behalf and told his story, presenting his case very favorably (Tr. 39). He was informed of his right to address the jury, but declined to do so; neither did the County Solicitor address the jury (Tr. 40).

The case of Betts v. Brady, 316 U. S. 455, is authority for our position that, under the facts here involved, the refusal of the trial court to appoint counsel for the petitioner did not deny the petitioner due process of law. In an exhaustive opinion in Betts v. Brady, this Court came to the conclusion that the provisions in State Constitutions that a defendant should be "allowed" counsel or should have a right "to be heard by himself or his counsel," or that he might be heard by "either or both," are not aimed to compel the State to provide counsel for a defendant. This Court pointed out that in six of the states, including Florida, the State courts had decided that the State constitutional provisions did not require the appointment of counsel for indigent defendants. (See footnote 24). In affirming Betts v. Brady, this Court said:

> "As we have said, the Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while want

> of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel."

There is not one scintilla of evidence to the effect that the petitioner in the case at bar was not given a fair trial, conducted in accordance with every principle of right and justice, and we submit that the petitioner has shown no denial of due process of law.

Certain cases decided by this Court subsequent to the decision in Betts v. Brady, supra, to-wit: Ex Parte Hawk, 321 U.S. 114; Williams v. Kaiser, 323 U.S. 471; Tompkins vs. Missouri, 323 U.S. 485; House vs. Mayo, 324 U.S. 42; White vs. Ragen, 324 U.S. 760; Rice vs. Olson, 324 U.S. 786; Hawk vs. Olson, 326 U.S. 271; Canizio vs. New York, 327 U.S. 82; Carter vs. Illinois,——— U.S.———, 91 L. Ed. 157 (Adv.) and De Meerleer vs. Michigan,——— U.S. ———, 91 L. Ed. 471 (Adv.); have led some to the mistaken idea that this Court has either overruled Betts v. Brady, or restricted it to such a point that it has no field of operation. To this we cannot agree. A careful analysis of said subsequent cases will reveal that the rule pronounced in Betts v. Brady has neither been overruled nor modified, and will reveal that said subsequent cases are not applicable to the case at bar.

Ex Parte Hawk, 321 U.S. 114, arose in Nebraska and involved a capital offense, viz., murder, instead of a non-capital offense such as was charged against the petitioner in the case at bar. This Court's holding as to counsel went no further than to say that Hawk was entitled to a hearing on his contention "that the state court forced him into trial for a capital offense, Neb. Comp. Stat. Section 28-401, with such expedition as to

deprive him of the effective asssistance of counsel, guaranteed by the due process clause of the Fourteenth Amendment." It would therefore appear that he had either procured counsel for himself or that the trial court had furnished him counsel under the requirement of the Nebraska Statute (see Nebraska Rev. Stat. 1913, Section 9081; Rev. Stat. 1943, Crim. Proc., Art. 18, Section 29-1803), and that no question was involved as to whether it was the duty of the court to appoint counsel.

Williams v. Kaiser, 323 U.S. 471, arose in Missouri, and involved a capital offense, viz., robbery by means of a deadly weapon, instead of a non-capital offense such as was charged against the petitioner in the instant case. Moreover, the Missouri statutes have important distinctions between robbery in the first degree, robbery in the second degree, grand larceny and petit larceny. These statutes, said this Court, involved "technical requirements of the indictment or information, the kind of evidence required for conviction, the instructions necessary to define the several elements of the crime, and the various defenses which are available." Furthermore, Williams charged that his request for counsel was denied, which denial was in the teeth of the Missouri statute requiring the trial court to assign counsel to any person charged with felony, whether capital or non-capital, who was unable to employ one. (See Missouri Rev. Stat. 1939, Section 4003). As we have hereinabove shown, no law of Florida required the trial court to assign counsel for the petitioner in this cause and his case was in no way a complicated one and did not involve a capital crime.

The case of Tompkins v. Missouri, 323 U.S. 485, also involved a capital offense, viz., murder in the first degree. It also arose in Missouri, where one charged with murder in the first degree could be found guilty of that

offense, or of murder in the second degree, or of manslaughter. This Court pointed out that the punishments for these offenses were different and that "The differences between them are governed by rules of construction meaningful to those trained in the law but unknown to the average layman." Moreover, Missouri had a statute which required the trial court to assign counsel to any person charged with felony who was unable to employ one. (See Missouri Rev. Stat. 1939, Section 4003.) We note that this Court did not overrule Betts v. Brady, supra, despite counsel's insistence in the brief filed in behalf of Tompkins, reported in 89 L. Ed. 409, that the decision in Betts vs. Brady was wrong and should be overruled.

In the case of House v. Mayo, 324 U.S. 42, there was no question raised as to the denial of counsel but the question before the court was as to whether or not the Fourteenth Amendment to the Constitution was violated when an accused, who had already employed counsel, was denied by the trial court the right to consult with such previously retained counsel before being arraigned and required to plead.

White v. Ragen, 324 U.S. 760, arose in Illinois. White was charged in two indictments with obtaining money and goods "by means of the confidence game." The Illinois statute required the court to appoint counsel for indigent defendants in all criminal cases. (See footnote 28, Betts v. Brady, 316 U.S. 455, text 470, citing Ill. R. S. 1935, C. 38, Section 754). White's allegations showed that, although counsel was appointed, the purpose and intent of said statute was not effectuated, his allegations being that counsel so appointed never did confer with him until they came to court for trial; that said counsel refused to do anything for him unless he had some money; that he asked said counsel to have a witness

called in his behalf but counsel said that he didn't have time and told White to plead guilty because the court would not grant a continuance; that he requested the court to give him time to call a witness and to confer with his attorney, but the Judge told him to "keep still as his lawyer would do all the talking for him"; and that thereupon said counsel pleaded him guilty to the two indictments. No comparable situation existed in the case at bar, where there was no statute requiring the appointment of counsel and where the petitioner, instead of having a plea of guilty entered for him against his will, received a fair trial on the simple issues involved.

Rice v. Olson, 324 U.S. 786, involved the conviction of an Indian for burglary in the State of Nebraska, which had a statute requiring the court to assign counsel to every person indicted for an offense punishable by imprisonment in the penitentiary, if the prisoner did not have the ability to procure counsel. (See Nebraska Rev. Stat. 1913, Section 9081; Rev. Stat. 1943, Crim. Proc. Art. 18, Section 29-1803). Rice's allegations showed that the trial court failed to comply with this statute, his allegations being that the trial court failed to advise him of his right to counsel and to call witnesses, and that the conviction was void because the alleged crime was committed on an Indian Reservation which was exclusively within the federal jurisdiction. This Court said that there was involved a most intricate question of law concerning federal jurisdiction, which no layman was capable of understanding and deciding. In the case at bar, not only was there no statute requiring the appointment of counsel but there was no intricate question of law involved.

In Hawk v. Olson, 326 U.S. 271, Hawk was charged with and convicted of murder. (Shown by the Nebraska decision under review, reported in 16 N. W. 2d 181, to

be first degree murder.) Nebraska had a statute requiring the court to assign counsel to every person indicted for a felony punishable by imprisonment in the penitentiary, if the prisoner did not have the ability to procure counsel. (See Nebraska Rev. Stat. 1913, Section 9081; Rev. Stat. 1943, Crim. Proc., Art. 18, Section 29-1803). Hawk's allegations showed that the purpose and intent of this statute was defeated, his allegations being that at his trial he was denied the opportunity to examine the charge, consult counsel and prepare a defense, and that he had no advice of counsel prior to the calling of the jury. Moreover, this Court pointed out that in Nebraska homicide had degrees and there were difficulties in the application of the rules. No comparable factual or legal situation existed in the case at bar.

Canizio v. New York, 327 U.S. 82, involved a conviction for robbery in the first degree. It does not appear that, at the time of Canizio's conviction, he had previously been charged with, convicted of, and served time for robbery in the first degree or any other degree, or that he had had any previous experience with the criminal law. In the case at bar, the petitioner, charged with burglary, had previously been convicted of another burglary and had served a sentence in the State Prison therefor. Also, Canizio pleaded guilty, while the State of Florida proved the guilt of the petitioner in this cause in a fair trial. Moreover, under the New York statute (Section 308, N. Y. Code of Criminal Procedure), if a defendant appeared for arraignment without counsel, the Court was required to ask him if he desired the aid of counsel and, if he did desire counsel, the Court was required to assign counsel, while Florida has never had such a statute.

Carter v. Illinois, ——— U.S. ———, 91 L. Ed. 157 (Adv.), involved a conviction for murder, for which

capital punishment could be imposed in Illinois. The Illinois statute required the court to appoint counsel in all cases where the defendants were unable to procure counsel. (See footnote [illegible] Betts v. Brady, 316 U.S. 455, text 470, citing Ill. R. S. 1935, C. 38, paragraph 754). Carter's claim that he was denied counsel was not supported by the common law record before the court, but, even if his claim be established by proper procedure, it can be established only by showing that the Illinois trial court violated the purpose and intent of said statute. Florida has no such statute; nor was the petitioner in the instant case charged with a capital crime.

De Meerleer v. Michigan, —— U.S. ——, 91 L. Ed. 471 (Adv.), is in no respect akin to the case at bar. De Meerleer's conviction was for first degree murder, for which a sentence to life imprisonment was imposed. In the case at bar, the petitioner was convicted for burglary, which carried a maximum penalty of fifteen years imprisonment and for which the petitioner was sentenced to serve only five years. De Meerleer's arraignment, trial, conviction and sentence all occurred on the very same day the information was filed, while in the instant case the petitioner's arraignment was on February 20th; on March 6th his case was set for trial at a later date; and he was not tried until March 14th. The Michigan trial court did not explain to De Meerleer the consequences of the plea of guilty, and the record indicated considerable confusion in his mind at the time of arraignment as to the effect of such a plea, but no such circumstance was present in the case at bar, where the petitioner not only pleaded not guilty, but had previous experience with the same type of crime and was kept advised of his rights by the trial judge throughout the trial. In the De Meerleer case, no evidence was introduced in his behalf and none of the State's witnesses were cross examined, while in the case at bar the peti-

tioner not only cross examined the State's witnesses but also testified in his own behalf and makes no claim that he was deprived of the benefit of the testimony of any witness or that there was in existence any witness whose testimony would have helped his defense. Moreover, Michigan had a statute requiring the trial court to appoint counsel in all cases where defendants were unable to procure counsel. (See footnote 28, Betts v. Brady, 316 U.S. 455, text 470, citing Mich. Stat. Anno., Section 28-1253).

CONCLUSION

In conclusion, we submit that the record shows that the petitioner was given a fair and impartial trial; that all of his legal rights were scrupulously observed; that he was correctly advised of court procedure; that no question was involved that could not readily be understood by any layman, eighteen years of age, who possessed an eighth grade education and who had previously been convicted of the same kind of crime and had served time in the State Prison therefor; that the petitioner was perfectly capable of conducting his own defense; that the laws of Florida did not require the appointment of counsel for the petitioner; and that, under the circumstances here involved, the trial court's refusal to appoint counsel did not violate the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted,

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J. TOM WATSON
Attorney General of the State of Florida,
Attorney for Respondent.

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REEVES BOWEN

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SUMTER LEITNER
Assistant Attorneys General,
Of Counsel.

APPENDIX

Florida Statutes, 1941

909.21 *Appointment of counsel in capital cases*

In all capital cases where the defendant is insolvent, the judge shall appoint such counsel for the defendant as he shall deem necessary, and shall allow such compensation as he may deem reasonable, such sum to be paid by the county in which the crime was committed. Counsel, so appointed, may in the event of conviction and sentence of death, appeal the case to the supreme court, and prosecute said appeal to its final conclusion with diligence; and until the supreme court has disposed of the appeal, no compensation shall be allowed to such counsel. If counsel first appointed is unable, for any reason, to perfect and prosecute the appeal, the court may relieve him from such duty, but shall appoint other counsel for such purpose. When counsel so appointed by the court, in capital cases, completes the duties imposed by this section, such counsel shall file a written report as to the duties performed by him, and apply for discharge by the court.

The compensation of counsel for the defendant, at the trial, shall not exceed one hundred dollars; and defendant's counsel's compensation on appeal, shall not exceed one hundred dollars additional.

The following is a copy of the information under which the petitioner, Donald Wade, was tried and convicted in the Criminal Court of Record of Palm Beach County, Florida, (except that the County Solicitor's affidavit to such information is omitted) to-wit:

IN THE CRIMINAL COURT OF RECORD,
of the County of Palm Beach and State of Florida,

JANUARY Term, in the year of our Lord, One Thousand nine hundred and forty-FIVE

STATE OF FLORIDA VS. DONALD WADE, CLYDE MacVICAR AND DOUGLAS CHARLES ROYCE	INFORMATION FOR BREAKING AND ENTERING

IN THE NAME AND BY AUTHORITY OF THE STATE OF FLORIDA:

W. E. ROEBUCK, County Solicitor for the County of Palm Beach, prosecuting for the State of Florida in the said County, under oath information makes that DONALD WADE, CLYDE MacVICAR and DOUGLAS CHARLES ROYCE of the County of Palm Beach and State of Florida, on the 19th day of February in the year of our Lord, one thousand nine hundred and forty-five in the County and State aforesaid, unlawfully did then and there break and enter the building of another, to-wit: the store building of Frank Deason, with intent then and there to commit a felony, to-wit: Grand Larceny, by then and there stealing, taking and carrying away property of another of the value of more than Fifty Dollars, contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State of Florida.

W. E. ROEBUCK
County Solicitor,
Palm Beach County, Florida.

Florida Statutes, 1941

810.02 *Breaking and entering other buildings, ship or vessel*

Whoever breaks and enters any other building or any ship or vessel with intent to commit a felony, or after having entered with such intent

breaks such other building, ship or vessel, shall be punished by imprisonment in the state prison not exceeding fifteen years. If the offender breaks such building with the use of any high explosive mentioned in §810.01, or if he enters having with him, or having entered, take into his possession any such high explosive, he shall be punished by imprisonment in the state prison not exceeding twenty years.